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5. Appeal and Error (§ 1175 (3)*)—Appellate Court Held Authorized to Enter Judgment, Dismissing Action.—Where on appeal from a judgment against a buyer of cattle it appeared that the seller had breached the contract in not delivering or tendering the quantity called for, and hence was not entitled to recover, the Supreme Court, in reversing the judgment, might, by virtue of Code 1919, § 6565, enter judgment of dismissal in favor of the buyer.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 476.]

Error to Circuit Court, Madison County.

Action by T. S. Hoffman against A. N. Johnson and James H. Fletcher. There was a judgment against defendant A. N. Johnson, and he brings error. Reversed and dismissed.

W. M. Fletcher, of Sperryville, and *Edwin H. Gibson* and *Grimley & Miller*, all of Culpeper, for plaintiff in error.

Jno. S. Chapman, of Stanardsville, and *N. G. Payne*, of Madison, for defendant in error.

TAYLOR *v.* BINSWANGER & CO. et al.

June 29, 1921.

[107 S. E. 649.]

Master and Servant (§ 375 (2)*)—Injury While Going to Lunch Held Not Compensable.—Under Workmen's Compensation Act, § 2, cl. (d), providing for compensation for accidental injuries arising out of and in the course of the employment, an employee cannot recover for injuries by being struck by an automobile while riding his bicycle on his way home to lunch during the noon hour.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 694.]

Certified Question from Industrial Commission.

Proceeding under the Workmen's Compensation Act to recover compensation for injuries by Alvin Taylor, employee, opposed by Binswanger & Co., employer. Certified question by Industrial Commission. Question answered.

AMERICAN PEANUT CORPORATION *v.*
NEWSOM SUPPLY CO. et al.

June 16, 1921.

[107 S. E. 650.]

1. Sales (§ 398*)—Instruction as to Shipment of Defective Peanuts Held Erroneous under the Evidence.—In an action by a buyer to re-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

cover the amounts paid for peanuts which proved to be defective, where the evidence showed that those purchased under the first contract were inspected by the buyer's agent before shipment, but that those under a second contract were taken to fill out a car and were not inspected, it being agreed that the buyer could reject defective peanuts on inspection after receipt, an instruction to find for defendants if the jury believed the peanuts were inspected, unless they further found that some damaged ones were shipped by mutual mistake, though correct as to the peanuts sold under the first contract, was erroneous as to those sold under the second contract.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 660.]

2. Appeal and Error (§ 889 (2)*)—Complaint against Seller and Buyer's Agent May Be Considered as Amended to Dismiss as to Agent.—In assumpsit against the seller and the buyer's agent jointly for the purchase price of defective goods, where there was no evidence to sustain a joint recovery from the two defendants, but the question was not raised below, the Supreme Court will, in accordance with Code, § 6331, treat the complaint as having been amended to dismiss as to the buyer's agent, as the plaintiff had a right to do under section 6102.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 348.]

Error to Circuit Court, Southampton County.

Action by the American Peanut Corporation against the Newsoms Supply Company and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Jno. N. Sebrell, Jr., of Norfolk, for plaintiff in error.

W. H. T. Loyall, of Norfolk, for defendants in error.

SMITH-GORDON CO., Inc., *v.* SNELLINGS.

June 16, 1921.

[107 S. E. 651.]

1. Appeal and Error (§ 1011 (1)*)—Findings of Trial Judge Conclusive.—Under Code 1919, § 6363, findings of trial judge are conclusive on conflicting evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 656.]

2. Brokers (§ 55 (1)*)—Broker Who Is Procuring Cause Entitled to Commissions.—Where more than one broker is authorized by the owner of property to make a sale, the broker who is the procuring cause thereof is alone entitled to the commissions.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 641.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.